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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1959

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the court of appeals (R. 527–539, 553–554) are reported at 262 F. 2d 571. The opinion of the district court (R. 304–319) is reported at 168 F. Supp. 490.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1958 (R. 539). A petition for rehearing was denied on January 27, 1959 (R. 555). The petition for a writ of certiorari was filed on February 24, 1959, and was granted on April 27, 1959 (R. 556), 359 U.S. 978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "commerce" issue in this case gave rise to a jury question.

2. Whether, as a matter of law, there was sufficient evidence of effect upon interstate commerce to support application of the Hobbs Anti-Racketeering Act.

3. Whether there was prejudicial variance between the language of the indictment relating to interstate commerce and the proof and instructions on that subject.

STATUTE INVOLVED

18 U.S.C. 1951 provides in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

The pertinent antecedent provision of the Anti-Racketeering Act of 1934 and amendments are set out in the Appendix, *infra*, pp. 39–41.

STATEMENT

I: THE EXTORTION.

Petitioner was the president of the Laborers' District Council of Western Pennsylvania, which was composed of local unions of common laborers affiliated with the International Hod Carriers, Building and Common Laborers' Union of America (R. 20–21, 29). In this capacity, he was the spokesman for the representatives of unions covering eleven counties (R. 28–29). He was also president of local union 1058 of the International Hod Carriers (R. 22) and the president of the Heavy Construction Council, which negotiated wages and working conditions for the Hod Carriers, Teamsters, Carpenters, and Engineers Unions with construction companies covering 33 counties of Western Pennsylvania (R. 22–25).

William A. Rider was engaged in the business of preparing and selling ready-mixed concrete [1] under the trade name of Rider Supply Company (R. 83). The Rider Supply Company had a subcontract to supply Ragnar Benson Company with all ready-made concrete needed for the construction of a hot strip steel mill which Ragnar Benson was erecting for the Pittsburgh Steel Company (R. 45–46). Under this subcontract, concrete was supplied from September, 1951 to March, 1954 (R. 169–172).

---

[1] Made of slag, sand and cement (R. 88). The ingredients are mixed in a batching plant (R. 89) and delivered in mixer trucks to the building site (R. 90).

The charge against petitioner was that, in violation of 18 U.S.C. 1951, he obstructed interstate commerce by extortion, *i.e.*, by obtaining money from Rider induced by the wrongful use of threats of labor disputes and threats of the loss of his contract, causing Rider to fear that preparation of the concrete would be delayed or altogether prevented (R. 7–8). The evidence against petitioner was that he extorted 50 cents for each cubic yard of concrete which was supplied pursuant to the subcontract under the threat that the payment was necessary to keep Mr. Rider "out of labor trouble" and "to hold on to the contract" (R. 105, 137). The money thus paid from 1951 through December 1953, amounted to $31,274.13 (R. 175). Petitioner was found guilty and sentenced to three years' imprisonment and fined $5,000 (R. 337).

A large part of the trial was devoted to evidence as to whether or not petitioner had made the threats as claimed. That issue, however, is not presently before this Court. The issues here involve the proof as to interstate commerce and the charge of the trial court on that subject.

II. THE INTERSTATE COMMERCE

A. *The Indictment*

The single count indictment charged in pertinent part (R. 6):

> 1. That at all times hereinafter mentioned a part of the interstate commerce of the United States has consisted of the transportation between the several states of materials and supplies for use in the making of ready mixed

concrete used in the construction and erection of a factory or plant for processing of steel.

2. That at all times hereinafter mentioned, William G. Rider was a party to a contract to supply ready mixed concrete for the erection of a steel processing plant at Allenport, Pennsylvania, and, for the purpose of performing said contract, caused supplies and materials to move in interstate commerce between various points in the United States and the site of his plant for the manufacture or mixing of ready mixed concrete, and more particularly, from outside of the State of Pennsylvania into the State of Pennsylvania.

It was charged that petitioner, knowing of the contract, willfully obstructed and delayed interstate commerce "and the movement of the aforesaid materials and supplies in such commerce" by his threats of labor disputes and "threats of the loss of, and obstruction and prevention of, performance of his contract to supply ready mixed concrete."

B. *Evidence as to Interstate Commerce*

1. Sand

Under Mr. Rider's lease for his business premises, he was required to purchase his sand requirements from the Duquesne Slag Company (R. 109). The Duquesne Slag Products Company purchased over 90% of all the sand it sold from the Duquesne Sand Company (R. 71).

The Duquesne Sand Company owned one dredge boat—the "Admiral" (R. 61). During the period involved in the indictment, this boat dredged sand from

the Ohio River exclusively in the States of West Virginia and Ohio (R. 48–49). The entire output of sand so dredged was sold to the Duquesne Slag Products Company (R. 61, 68). The sand was cleaned and then shipped by barge to Pittsburgh (R. 56) or sent by barge and stored at Leetsdale, Pennsylvania (R. 65).

In 1951, the Duquesne Slag Company sometimes delivered sand to Rider by transshipping it by rail from their Brady Street yard to the Belle Vernon plant (both in Pennsylvania) where Rider had his business (R. 81–82, 90). During the remaining years, the sand was transported by barge, either by transshipping from the Slag Company's Brady Street yard to Rider or by direct consignment to Rider (R. 71, 79–80).

2. Steel

George Herbert Keisling, the Assistant Controller of the Pittsburgh Steel Company, testified that the product—hot rolled sheet and strip—of the steel mill that was built, was used in the automotive and appliance industry (R. 49–50) and was shipped to Michigan and Kentucky (R. 53). About 80% of the product of the hot strip mill was shipped interstate (R. 55). The basic material for this mill—iron ore—came largely from Minnesota and a small portion from South America (R. 53). This particular hot strip steel mill began operations in March, 1953 (R. 54) (before the last payment to petitioner in December, 1953).

C. *The Court's Instructions to the Jury*

The petitioner made no requests for jury instruc-

tions (R. 280, 299). The court charged the jury in pertinent part as follows (R. 286–288):

> Since it is your exclusive function to decide what the facts are, it will be for you to determine the facts relating to the interstate commerce aspect of this case. It is only if there has been one of these effects on interstate commerce that an offense against the laws of the United States has been committed, because interstate commerce is the basis of the federal jurisdiction in this case.
>
> At the opening of the case, the Government introduced evidence relating to the dredging and shipment of sand which it contends was used in the manufacture of the cement which Mr. Rider used in performing the Ragnar-Benson contract which has been the subject of much testimony in this case.
>
> It is the Government's contention that all or substantially all of the sand so used has been shipped in interstate commerce. It is also the position of the Government that concrete supplied by Mr. Rider containing the sand shipped in interstate commerce was being used in the construction of a plant which, when in operation, would produce articles of steel to be shipped in interstate commerce.
>
> Consider the evidence of the Government on this question in the light of any other circumstances or other evidence bearing on the interstate nature of the shipment of sand or the sand used in making concrete supplied by Mr. Rider and on the use to which the mill under construction would be and was put. Then if you are satisfied beyond a reasonable doubt that the sand has been shipped from another state

> into Pennsylvania by any means of transportation and was used in making concrete supplied by Mr. Rider and that Mr. Stirone extorted money from Mr. Rider, the alleged extortion would be an act which obstructed, delayed or affected interstate commerce, and the movement of commodities in interstate commerce.
>
> Or if you are satisfied beyond a reasonable doubt that Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce and if you also believe that the defendant extorted money from Mr. Rider, you are instructed as a matter of law that there has been a substantial effect on interstate commerce shown by the United States. In other words, if you find the facts to be as the Government contends, interstate commerce has been affected, obstructed and delayed.

The petitioner objected to this charge as follows (R. 300):

> * * * I also except to the Court's charge as to interstate commerce, especially as to the sand and particularly to the Pittsburgh Steel mill.

III. THE OPINIONS BELOW

A. *The District Court*

The district judge overruled the petitioner's post-trial motions (R. 304–319; 168 F. Supp. 490). Its opinion framed the pertinent issues and holdings as follows (R. 305–307):

> In the indictment it was charged that the defendant by his coercive actions obstructed, delayed and affected interstate commerce and

the movement of materials and supplies—i.e., sand, in interstate commerce. It was then proved at the trial that sand used by Rider in manufacturing ready-mixed concrete and purchased from Duquesne Slag Products Company had without question been transported in interstate commerce, and secondly, that steel articles produced at the plant after construction had been transported in commerce to the centers of the appliance and automotive industries outside the State of Pennsylvania. A sufficient foundation for introduction of both kinds of proof was laid in the indictment.

Defendant's denial that interstate commerce was affected by his actions is based in part upon an argument that interstate commerce ended with the delivery of the sand in Pennsylvania; that the interstate character of the sand was lost when it was delivered to and stored by Duquesne Slag Products Company and Rider; and that the sand lost its identity as a separate article of commerce when it was mixed with other ingredients to form a new product, ready-mixed concrete. * * * The court correctly told the jury that if the government's facts were believed, interstate commerce had been affected by the conduct of the defendant. Cf. *United States* v. *Lowe*, 3 Cir., 1956, 234 F. 2d 919, 922–923, cert. denied, 1956, 352 U.S. 838. That statement was based upon a premise that a deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs and affects interstate commerce as surely as though the same act had cut off the supply at its source. * * *

Defendant also urges that the "new construction" doctrine prevents consideration of the interstate shipment of products manufactured at the plant following its completion in determining whether the extortion here affected interstate commerce. That doctrine appears no longer to be controlling, in cases arising under the Federal Employers' Liability Act and the Fair Labor Standards Act where it arose. *Southern Pacific Co.* v. *Gileo*, 1956, 351 U.S. 493; *Mitchell* v. *G. W. Vollmer & Co., Inc.*, 1955, 349 U.S. 427. Nor was it considered in *Hulahan* v. *United States*, 214 F. 2d 441, under circumstances similar to the instant case. There is no reason for adopting so restrictive an interpretation of the act.

B. *The Court of Appeals*

The court of appeals affirmed the conviction with one judge dissenting (R. 527–539; 262 F. 2d 571–580). A petition for rehearing was denied with two judges dissenting (R. 553–555; 262 F. 2d at 580).

In the majority's view, the extortion affected commerce because one of the principal ingredients used by Rider in making concrete was sand which, in "considerable quantity", came directly from an out-of-state source (R. 528). The majority was also of the opinion that the threatened interference with the building of the steel mill—which, upon completion, was to produce goods for commerce—was sufficient to bring the offense within the statute (R. 530–531). It held finally that, if there was variance between the indictment and the proof so far as steel commerce was concerned, it did not constitute reversible error be-

cause the defense was not surprised or prejudiced by the line of proof offered (R. 529–530).

The dissenters did not take issue with the proposition that sand commerce was established by the proof. They were of the view, however, that the Act does not reach "new construction" (even though the facility in process of construction will produce goods for commerce) and that the verdict must fall because the case was submitted to the jury upon alternative theories as to commerce (R. 536–537, 539). Additionally, the dissenters were of the opinion that the indictment did not charge interference with commerce in steel and that there was a fatal variance between the indictment and the proof (R. 554).

SUMMARY OF ARGUMENT

I

The gist of the crime charged in this case is extortion. To establish federal jurisdiction under the Hobbs Act, it is necessary, of course, that there be an effect upon interstate commerce. But that is a jurisdictional requirement, not one which goes to the nature or substance of the criminal conduct.

Where, as here, the operative facts (as to transportation, shipments and the like) which bear on the commerce issue are not contested and the only dispute is whether there was an effect upon interstate commerce as a matter of law, the question is one appropriate for determination by the trial judge. As Judge Learned Hand stated in another anti-racketeering case in which the facts relating to commerce were uncontroverted, "the business was interstate as [a]

matter of law, and the question should not have been submitted to the jury * * *." *United States* v. *Compagna,* 146 F. 2d 524, 527 (C.A. 2), certiorari denied, 324 U.S. 867.

If we are correct in our view that there was no need to submit the commerce issue to the jury at all, it suffices that the extortionate conduct affected commerce in sand (a point as to which there was no disagreement among the judges in the court of appeals). On that premise, it becomes unnecessary to consider whether the dissenting judges were correct in believing (1) that the facts were not legally sufficient to show an effect upon commerce in steel and (2) that commerce in steel was not sufficiently alleged in the indictment.

II

In any event, we undertake to show that both commerce in sand and commerce in steel were necessarily affected when Rider (the victim of the extortion) was compelled to pay tribute in order to avoid interference with his contract to supply concrete to the steel mill construction project in Pittsburgh.

A. Preliminarily, we point out that Congress, in enacting the Anti-Racketeering Laws, has purposefully exercised the full measure of the constitutional commerce power. The original 1934 Act proscribed extortion "in any way or in any degree affecting trade or commerce" and defined commerce in terms of the "constitutional jurisdiction" of the United States. The statutory language has undergone various changes as a result of amendment (in 1946) and codification (in 1948), but the scope of commerce

coverage has not been altered. In its present form, the Act reaches any person who "*in any way or degree* obstructs, delays, or affects commerce or the movement of any article or commodity in commerce," and it covers *all* "commerce over which the United States has jurisdiction" (emphasis added).

B. The effect upon commerce in sand is clear. Sand is a major ingredient of concrete. Rider obtained his sand supply from outside Pennsylvania, substantial quantities of it moving directly to his premises by barge. Interference with his ability to perform contracts to supply concrete would necessarily be reflected in his need for sand and in his sand purchases. The fact that the extortion would affect the victim's requirements for a commodity shipped in interstate commerce establishes federal jurisdiction, without more. See, *e.g.*, *Labor Board* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684; *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, 189. Although it is unnecessary to go further, we also believe that the legal situation is no different with respect to out-of-state sand which moved to Rider through intermediaries; the theory of cases like *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, applies here with full force.

C. Effect upon commerce in steel rests upon (1) the fact that Rider had a contract to do the concrete work involved in the construction of a steel mill; (2) the fact that interference in the performance of this work would necessarily impede the entire project; and (3) the fact that the steel mill (which actually began its operations before Rider's contract was com-

pleted) sent the major portion of its produce into the channels of interstate commerce. This is not to argue that all aspects of the construction industry are broadly subject to federal regulation. It is to say that Congress may protect interstate trade and commerce from criminal activities which affect that commerce irrespective of whether the "squeeze" is locally applied.

Cases arising under the National Labor Relations Act are apposite. The coverage of that statute, like the coverage of the Hobbs Act, is coextensive with the constitutional commerce power. Moreover, since the power of organized labor finds fundamental protection in federal law, it is highly appropriate to look to the Labor Board's jurisdiction when one considers federal jurisdiction over persons who seek to misuse the power of organized labor by threatening to invoke it for their private criminal purposes rather than for legitimate ends. It is thus pertinent to ask—Would the Labor Board be empowered to exercise jurisdiction over a labor dispute involving the employees of a building contractor engaged in constructing a steel mill for a steel company which ships its products in interstate commerce? The cases demonstrate that the answer is affirmative. They leave no doubt that the Board may deal with labor disputes involving intrastate companies which supply facilities, goods or services to others who, in turn, engage in interstate commerce. See, *e.g.*, *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383; *Labor Board* v. *Thomas Rigging Co.*, 211 F. 2d 153 (C.A. 9), certiorari denied, 348 U.S.

871. And compare cases arising under the Fair Labor Standards Act, discussed *infra*, pp. 33–34.

We are mindful of the cases, arising principally under the Federal Employers' Liability Act, which took the view that "new construction" is not commerce even though the work, when completed, will become a part of commerce. That statute, which is "of another vintage" (*Mitchell* v. *C. W. Vollmer & Co.*, 349 U.S. 427, 429), was far narrower, however, in its provision for coverage. Morever, a recent decision of this Court has explicitly rejected the doctrine in a case involving the rights of a railroad employee engaged in building new cars. *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 500.

III

Petitioner's claim of variance rests upon the assertion that effect upon commerce in steel was not sufficiently alleged in the indictment. It is true that the indictment focuses on commerce in sand. However, we point out (1) that direct reference is made to the contract to supply concrete for the steel mill and (2) more importantly, that the charging portion of the indictment alleges in general terms the obstruction of interstate commerce. Since the indictment would not be fatally defective as a matter of law if it simply alleged an effect upon commerce without any "clarifying details" (*United States* v. *Varlack*, 225 F. 2d 665, 670 (C.A. 2); compare *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 250 ("variation between the means charged and the means utilized is not fatal")), the question is whether, under the cir-

cumstances, petitioner was prejudiced. Under the criteria stated in *Berger* v. *United States*, 295 U.S. 78, 82, this question has two aspects: (1) Was petitioner impeded in the presentation of his defense? (2) Was he protected against a second prosecution for the same offense?

As the court of appeals held, after careful examination of the record, petitioner was not impeded in making out his defense. The evidence as to steel commerce (brief testimony by an official of the Pittsburgh Steel Company that the Allenport plant ships approximately 80 percent of its produce to destinations outside of Pennsylvania) was given early in the trial for purposes which were made perfectly plain by the prosecution. Petitioner objected on grounds of relevancy, but gave no indication that he challenged the accuracy of the testimony, that he wished to introduce rebuttal evidence on the point, or that he desired time in order to do so.

Nor has petitioner any basis for claiming a risk of double jeopardy. One act of extortion is one crime, no matter how numerous the ways, direct or incidental, in which commerce may be affected thereby. The Hobbs Act has never been otherwise interpreted. And *Ladner* v. *United States*, 358 U.S. 169, makes it evident that this Court would not sanction a multiplication of offenses in the present situation.

ARGUMENT

I. IN THIS CASE, THE "COMMERCE" ISSUE DID NOT GIVE RISE TO A JURY QUESTION

The gist of the crime charged in this case is extortion. As we point out *infra* (pp. 21–25), it was the

purpose of Congress to reach any extortion that comes within the scope of the federal commerce power. This means, to be sure, that there must be an effect or burden upon commerce for the case to be one within the federal jurisdiction. But this is a jurisdictional requirement, not one which goes to the substance of the criminal conduct.

We shall assume that it is appropriate to submit to the jury for its determination any factual issue which may underlie the determination as to effect upon interstate commerce.[2] We believe, however, that where there is no contested issue as to the operative facts (the facts as to transportation, shipments and the like) and the only question is the legal characterization to be given to the established course of commercial conduct, there is no necessity whatever to submit to the jury the "commerce" issue. If we are correct in our contention that there was no need in this case to submit that issue to the jury at all and that the sole function of the jury, in the circumstances, was to determine whether there was extortion, it becomes unnecessary for the Court to consider whether the trial court erred in instructing the jury as to "steel" commerce. Stated otherwise, if we are correct in Point I, the only remaining question is whether the

[2] This is characteristically done by charging a jury, "If you believe that such and such transactions took place, then I charge you as a matter of law that there was an effect upon interstate commerce." See, *e.g.*, the following cases arising under the Hobbs Act. *United States* v. *Green* 246 F. 2d 155, 160–161 (C.A. 7), certiorari denied, 355 U.S. 871; *Hulahan* v. *United States*, 214 F. 2d 441, 445–446 (C.A. 8), certiorari denied, 348 U.S. 856; *United States* v. *Lowe*, 234 F. 2d 919 (C.A. 3), certiorari denied, 352 U.S. 838; *United States* v. *Varlack*, 225 F. 2d 665 (C.A. 2).

evidence as to *either* aspect of commerce ("sand" commerce *or* "steel" commerce) was legally sufficient to bring the case within the ambit of the Hobbs Act.

Our starting point is that there was uncontroverted testimony showing (1) that there were continuous sand movements from an out-of-state source to Rider, (2) that the sand was thereafter used by Rider to manufacture concrete, and (3) that the concrete was used in constructing a steel mill which engaged, in turn, in the production of goods for commerce. The testimony as to sand movements was provided by a witness from the United States Army Corps of Engineers (R. 47–49). It was corroborated by a witness who was an officer of the sand company and of the barge company (R. 55–69). It was further corroborated by an officer of the slag company (R. 69–82). The testimony of these witnesses was nowhere denied. Indeed, it was not in the least questioned by the petitioner's own witness, Robert O. Dierker, president of the slag company which sold the sand to the extortion victim, a man who was in a position to dispute any erroneous testimony on the point (R. 212–215, 459–460). The testimony as to the use of the sand in making concrete for the steel mill construction job appears at R. 87–89, and is likewise undisputed. The testimony that the steel mill produced goods for commerce appears at R. 49–55, and is nowhere controverted in the record.

Where, as here, there is no contested issue of fact underlying the jurisdictional issue and room only for argument as to the legal inferences to be drawn from the established facts, the matter, we submit, is

one appropriate for determination by the court. As stated by the late Chief Judge Parker, "One cause of failure in jury trials results from burdening juries with matters that they are not qualified to determine."[3] In a case arising under the Anti-Racketeering Act of 1934,[4] predecessor of the present statute, Judge Learned Hand stated (*United States* v. *Compagna*, 146 F. 2d 524, 527 (C.A. 2), certiorari denied, 324 U.S. 867):

> * * * If these were the facts, the business was interstate as [a] matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue. * * *

Cases arising in other contexts support this conclusion. *Blumenthal* v. *United States*, 88 F. 2d 522, 528 (C.A. 8), involved a charge of theft from a common carrier engaged in interstate commerce; whether the carrier was a common carrier was held to be a

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[3] Parker, *Improving the Administration of Justice*, 27 A.B.A. Journal 71, 74. See, also, Broeder, *The University of Chicago Jury Project*, 38 Neb. Law Rev. 744, 754–760; Zeisel, Kalven, Jr., and Buchholz, *Delay in the Court* (1959); Green, *Judge and Jury* (1930), p. 351; Orfield, *Criminal Procedure from Arrest to Appeal* (1947), p. 449.

[4] That Act provided in pertinent part (Appendix, *infra*, p. 39):

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services. * * * shall, upon conviction thereof, be guilty of a felony * * *."

question for the court, the evidence bearing on this subject being undisputed. In *Nordgren* v. *United States*, 181 F. 2d 718, 721 (C.A. 9), a prosecution for offering a bribe to a United States officer, it was held that the question whether the offeree was such an officer need not be left to the jury where there is no controversy as to facts pertaining to the functions he was performing. See, also, *United States* v. *Mura*, 191 F. 2d 886 (C.A. 2); *United States* v. *Jonikas*, 197 F. 2d 675 (C.A. 7), certiorari denied, 344 U.S. 877; *Schwachter* v. *United States*, 237 F. 2d 640 (C.A. 6). Cf. *Mitchell* v. *Denton*, 224 F. 2d 596 (C.A. 5); *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F. 2d 636, 643 (C.A. 5).[5]

II. THE EVIDENCE AS TO BOTH SAND AND STEEL COMMERCE WAS LEGALLY SUFFICIENT TO ESTABLISH THAT THE OFFENSE WAS WITHIN THE REACH OF THE FEDERAL ACT

If, as argued above, there was no jury question as to the facts bearing on the commerce issue, but only a question for the court as to whether uncontested facts showed interstate commerce as a matter of law, it suffices to show that the evidence was legally suffi-

[5] It is, of course, no novel constitutional doctrine that some issues in a criminal trial are for the court to determine, even though they may involve an interpretation of facts. Thus, the competency of the tribunal and the materiality of the question falsely answered are elements in the offense of perjury, but nonetheless issues for the court. *United States* v. *Williams*, 341 U.S. 58. And see *Sinclair* v. *United States*, 279 U.S. 263, 298 ("The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence").

cient to establish an effect upon *either* interstate commerce in sand (which all judges below found to be established) *or* interstate commerce in steel (which a majority found). In this portion of the brief, we shall argue that the evidence was legally sufficient to establish both. We urge preliminarily that Congress, in enacting the statute, proposed to exhaust the federal commerce power and that accordingly the Act is not to be narrowly or grudgingly construed.

A. THE ANTI-RACKETEERING LAWS ENACTED BY CONGRESS WERE DESIGNED TO EXTEND TO THE FULLEST REACH OF THE FEDERAL POWER

The origin of the present statute is the Anti-Racketering Act of 1934. That Act was amended by the Hobbs Act in 1946, and the Hobbs Act, in turn, was codified in 1948. All of the relevant history shows a plain and continuing purpose to exhaust the full constitutional power of Congress over commerce.

The Anti-Racketeering Act of 1934 as originally passed, 48 Stat. 979, read in pertinent part (see Appendix, *infra*, pp. 39–40):

> That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, *and all other trade or commerce over which the United States has constitutional jurisdiction.*
>
> Sec. 2. Any person who, *in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce*—

> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, * * *
>
> * * * * *
>
> (d) * * * shall, upon conviction thereof be guilty of a felony * * *. [Emphasis added.]

In view of the explicit statutory reference to "constitutional jurisdiction," it is unnecessary to examine the legislative history at length. We note briefly that the original Act was one of thirteen bills submitted by the Copeland Committee after its investigation of racketeering (see discussion in *United States* v. *Local 807*, 315 U.S. 521, 528–529), and that both the relevant House and Senate Reports reflect a purpose to reach the proscribed types of conduct to the full extent that the commerce power permits.[6]

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[6] The House Report accompanying the bill quotes a letter from Attorney General Homer Cummings, which stated (H. Rep. No. 1833, 73rd Cong., 2d Sess., p. 2):

"The Sherman Antitrust Act is too restricted in its terms and the penalties thereunder are too moderate to make that act an effective weapon in prosecuting racketeers. The anti-racketeering bill would extend the Federal jurisdiction in those cases where racketeering acts are related to interstate commerce and are therefore of concern to the Nation as a whole."

The Senate Report, quoting a memorandum from the Department of Justice, declares (S. Rep. No. 532, 73rd Cong., 2d Sess., p. 1):

"The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and *to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers.* * * *" (Emphasis added.)

This was read on the Senate floor in response to a request for an explanation of the bill (78 Cong. Rec. 5735).

The Hobbs Act of 1946, an amendment of the 1934 statute,[7] was designed to include the type of racketeering which this Court held outside the 1934 Act in *United States* v. *Local 807*, 315 U.S. 521, and the amendment and debates are concerned almost wholly with the scope of the Act in connection with labor practices.[8]

The scope of the statute in relation to commerce was not narrowed. The 1946 amendment, 60 Stat. 420, read in pertinent part (Appendix, *infra*, pp. 40–41):

> SEC. 1. As used in this title—
>
> (a) The term "commerce" means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) *all other commerce over which the United States has jurisdiction;* and the term "Territory" means any Territory or possession of the United States. [Emphasis added.]
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> * * * * * *
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> SEC. 2. Whoever *in any way or degree* obstructs, delays, or affects commerce, or the movement of any article or commodity in com-

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[7] See H. Rep. No. 238, 79th Cong., 1st Sess., p. 1; 91 Cong. Rec. 11846.

[8] See H. Rep. No. 238, *supra;* remarks of Congressman Hancock, 91 Cong. Rec. 11,900, Congressman Summers, 91 Cong. Rec. 11,909, Congressman Jennings, 91 Cong. Rec. 11,911, Congressman Cox, 91 Cong. Rec. 11,841, and Congressman Michener, 91 Cong. Rec. 11,842. And see *United States* v. *Green*, 350 U.S. 415, 419.

> merce, by robbery or extortion, shall be guilty of a felony. [Emphasis added.]

Finally, in 1948, solely by codification, the Act assumed its present form. Again there has been a rearrangement of terms, but they have the identical scope, in terms of commerce, as the original Act. The 1948 Act, 62 Stat. 793, 18 U.S.C. 1951, provides in pertinent part:

> (a) Whoever *in any way or degree* obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. [Emphasis added.]
>
> (b) As used in this section—
>
> * * * * *
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and *all other commerce over which the United States has jurisdiction.* * * * [Emphasis added.]

By 1946, the commerce power had been very broadly interpreted. Against this background, Congress made explicit in the re-written Hobbs Act its continuing purpose to exhaust the scope of federal power—to

cover "*all*" interstate commerce and the specified conduct affecting such commerce "*in any way or degree.*" There is thus no warrant in the words or the history to read this Act narrowly.

B. INTERSTATE COMMERCE IN SAND WAS AFFECTED

As already noted, none of the judges in the court below doubted that petitioner's acts obstructed the interstate commerce involved in the transportation of the sand necessary to make the concrete, and that this obstruction constituted an offense. Petitioner's threat was to make Rider lose his contract if the extortionate demand was not satisfied. Without the contract, Rider would not have bought the sand which he used to make the concrete. His sand supply came from outside the State of Pennsylvania, some of it being delivered directly to Rider by barge. Assuming that the prime contractor in the case at bar might have obtained concrete from someone else, it is still true that the interstate commerce involved in the sand that went to Rider would have been affected. See *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326. In short, the fact that the extortion would affect the victim's requirements for a commodity (sand) shipped in interstate commerce adequately supports federal jurisdiction. *Labor Board* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675.

While the consignment of certain sand barges directly to Rider makes the involvement with a commodity shipped in interstate commerce obvious, we believe that the legal situation is no different with respect to the balance of the sand. In *Walling* v.

Jacksonville Paper Co., 317 U.S. 564, for example, this Court held that the Fair Labor Standards Act (which is not in terms as broad as the Hobbs Act) covered certain employees of a wholesale paper company who were engaged in delivering goods from the company's warehouse to customers within the same state, even though there had been a temporary pause of the goods at the warehouse. The goods had been procured outside the state upon prior orders from, or pursuant to, contracts with such customers. It was held that such goods retained their character as interstate goods until finally delivered to the customers, and that they were not divested of that character by the stop at the warehouse, or by the fact that the company regarded them as stock in trade, or by the circumstance that title passed to the wholesale paper company upon delivery at its warehouse.

Nor does an intervening intrastate sale, if such there was in the case at bar, insulate petitioner from federal jurisdiction. In *United States* v. *Sullivan*, 332 U.S. 689, a retail druggist was prosecuted for misbranding sulfathiazole tablets by removing them from their original boxes and putting them into new boxes without the proper labels. Despite the fact that he had purchased them from a wholesaler within the state, and that some six months had elapsed from the date of completion of the interstate shipment, it was held that the Federal Food, Drug & Cosmetic Act applied. Cf. *F.T.C.* v. *Mandel Brothers*, 359 U.S. 385, 391.

That the measure of the extortion was the amount of concrete sent to the building site, rather than the sand coming to Rider through the channels of interstate commerce, is not significant from the standpoint of federal jurisdiction. In either event, the burden is one which clearly affects the interstate commodity. As numerous Sherman Act cases demonstrate, local restraints upon builders or upon processors of goods may restrain the free flow of commerce in the ingredient materials. See, *e.g., United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464, and *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, 189. Cases arising under the National Labor Relations Act make the same point. *Labor Board* v. *Fainblatt*, 306 U.S. 601, 604–606; *Labor Board* v. *Bradford Dyeing Assn., supra,* 310 U.S. at 326; *Labor Board* v. *Denver Building & Const. Trades Council*, 341 U.S. 675. As stated in the *Denver* case (p. 684):

> * * * The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.

Other cases involving application of the Hobbs Act disclose factual situations similar to this one. In *Hulahan* v. *United States,* 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856, the prosecution was based on extortion from three construction companies, two of which were dependent upon local labor (represented in part by the appellant in that case) and upon equipment, supplies and materials shipped into the state of use from other states. One of the con-

struction companies was engaged in a home development project, a second company in the construction of a flour packaging and storage building for a company which used the instrumentalities of interstate commerce for obtaining grain and distributing the company's products, and the third in construction of new runways and the improvement of the old runways of the St. Louis airport. The court of appeals stated, in affirming the conviction (p. 445):

> * * * We have no doubt that Congress has the power to deal with extortion or attempted extortion actually or potentially affecting interstate commerce, just as it has power to deal with unfair labor practices so affecting interstate commerce. [Citing cases.]
>
> It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion or attempted extortion which in any way or in any degree reasonably could be regarded as affecting such commerce. The exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce, is, in our opinion, proscribed by the statute in suit.

A prior case in the Eighth Circuit involved extortions from independent motion picture exhibitors. *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari denied, 314 U.S. 687. The court of appeals affirmed the conviction, relying on *Labor Board* v. *Fainblatt*, 306 U.S. 601. The opinion states, 122 F. 2d at 668:

> * * * There [in *Fainblatt*] the effect was upon the origination of interstate commerce. The situation before us affects the termination or purpose of interstate commerce and is just as effective in preventing such commerce. The only purpose for shipping these picture films in interstate commerce is to have them licensed or leased for exhibition purposes. If exhibitors are prevented or seriously obstructed in exhibiting the films they will not buy them. If exhibitors will not buy the films they will not be shipped in interstate commerce. In effect upon interstate commerce, there is no difference between preventing the films entering interstate commerce and in preventing them being used at the points to which they may be shipped—in either case, the films will not be shipped because of the obstruction.

See, also, *United States* v. *Compagna*, 146 F. 2d 524, 527 (C.A. 2), certiorari denied, 324 U.S. 867; *Anderson* v. *United States*, 262 F. 2d 764, 770 (C.A. 8), certiorari denied, 360 U.S. 929; *Bianchi* v. *United States*, 219 F. 2d 182, 190–191 (C.A. 8), certiorari denied, 349 U.S. 915; *United States* v. *Floyd*, 228 F. 2d 913, 915–916 (C.A. 7), certiorari denied, 351 U.S. 938.

C. INTERSTATE COMMERCE IN STEEL WAS AFFECTED

The threat that petitioner used to extort money from Rider was that he would cause labor trouble and disable Rider from performing his subcontract to supply concrete for construction of a steel mill. The mill that was being built was a new venture for the Pittsburgh Steel Company which had not previously built a hot rolled plant (R. 54). The new steel plant went into operation in March 1953 (R.

55), before Rider's contract was completed, and 80 percent of its products were shipped interstate (*ibid.*). In these circumstances, we see no escape from the conclusion that the statutory test—obstructing, delaying or affecting commerce *in any way or degree* (see *supra*, pp. 24-25)—was met. Any delay in construction of the plant, any increased costs in its construction, any defects in the work would have a palpable and immediate effect on the steel company and upon its interstate trade.

Since the extortion was successful and performance of the contract was not interrupted, one cannot prove directly the precise consequences which would have resulted from the outbreak of labor trouble. However, it is hardly a matter of speculation that labor trouble of the kind that was threatened, if it had taken place, would have affected the entire project. Nor is it a matter of speculation that, if the authorized subcontractor had been forced to abandon his contract, some delay would necessarily have resulted in obtaining a new supplier.[9]

We are not suggesting that federal jurisdiction is to be extended to activities of purely local significance. Nor are we suggesting that members of the construction industry are generally or broadly subject to federal regulation. It is a familiar precept that a business may be subject to federal jurisdiction in some of its aspects, though not in others. For example, application of the Fair Labor Standards Act, which turns on the activities of the employees

[9] We put aside the potential effect of extortion on the price and terms which might be obtained from other suppliers.

and not the business of the employer, may result in a company's being subject to the requirements of that Act with respect to certain of its employment relationships, although it is not comprehensively covered. See *Mitchell* v. *Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211–212. In short, it is not our contention that the construction industry has inherent characteristics which make it fully a subject of federal concern. We urge simply that Congress may protect interstate trade and commerce—in this instance, interstate trade in steel—from criminal activities which affect that commerce, irrespective of whether the "squeeze" is locally applied.

Cases arising under the National Labor Relations Act provide a close analogy to the case at bar. In that statute, like this one, Congress undertook to exert jurisdiction coextensive with the commerce power. *Labor Board* v. *Fainblatt*, 306 U.S. 601, 606–607. Moreover, since the economic power of organized labor derives fundamental support from the protections accorded by federal law, it is especially appropriate that one look to the scope of the Board's jurisdiction under the Labor Act in considering the scope of federal jurisdiction over persons who seek to misuse the power of organized labor by threatening to invoke it for the criminal purpose of extortion rather than the legitimate end of collective bargaining. We therefore think it is relevant to raise the question—Would the Labor Board be empowered to exercise jurisdiction over a labor dispute involving the employees of a building contractor engaged in constructing a steel mill for a steel company which ships its products in interstate commerce? We think

that the decided cases leave no room for doubt that the answer is "Yes."

There are numerous instances in which the Board has been upheld in its exercise of jurisdiction over intrastate companies which supply facilities, goods or services to others who, in turn, engage in interstate commerce. Thus, "[e]ver since the question was fully argued and decided in *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197 (1938), it has been clear that federal labor legislation, encompassing as it does all industries 'affecting commerce,' applies to a privately owned public utility whose business and activities are carried on wholly within a single state." *Bus Employees* v. *Wisconsin Board,* 340 U.S. 383, 391. In the same case, this Court cited with approval (p. 391, note 13) the case of *Labor Board* v. *Baltimore Transit Co.,* 140 F. 2d 51, 53 (C.A. 4), in which federal jurisdiction over a local transit company was sustained because a stoppage of the company's operations would interfere with businesses engaged in interstate commerce "whose workers are transported to and from work on its cars and buses." In *Labor Board* v. *Thomas Rigging Co.,* 211 F. 2d 153 (C.A. 9), certiorari denied, 348 U.S. 871, the court sustained the Board's exercise of jurisdiction over a labor dispute involving a subcontractor hired to install machinery in a plant then under construction, which was to be used subsequently to manufacture goods for commerce. The Board has also regularly exercised jurisdiction over companies which are locally engaged in mining or producing building materiel which is thereafter sold within the state and used in con-

structing or maintaining the state's highway system. See cases collected in *White's Uvalde Mines*, 117 NLRB 1128, 1137–1138.

We recognize that early cases arising under the Federal Employers' Liability Act enunciated the doctrine that "new construction" is not commerce even though the work, when completed, will become a part of commerce. See, *e.g.*, *Raymond* v. *Chicago, Milwaukee & St. Paul Railway Company*, 243 U.S. 43. That Act, however, was far narrower in its provision for coverage;[10] compared to more recent exercises of the federal regulatory power, the original Federal Employers' Liability Act is a statute "of another vintage", *Mitchell* v. *C. W. Vollmer & Co.*, 349 U.S. 427, 429. Moreover, the "new construction" doctrine has now been explicitly rejected in the very area in which it had its origin. *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 500, in terms rejected the doctrine and sustained coverage of a railroad employee engaged in building new cars.

Although Congress, in the Fair Labor Standards Act, has not exercised the totality of its power to control all activities affecting commerce (*Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 522), cases arising under that statute likewise support the conclusion that the situation posed by the instant case is one which is cer-

[10] In its original form, the Act provided that "every common carrier by railroad while engaging in commerce" between the states "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce", etc. In 1939, Congress covered in employees whose duties "directly or closely and substantially affect such commerce". See *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 496–498.

tainly within federal jurisdiction. Maintenance employees who service buildings used by tenants who engage in interstate commerce are within the statute's coverage. *Kirschbaum Co.* v. *Walling, supra; Schulte Co.* v. *Gangi,* 328 U.S. 108. The Act applies to construction workers building a new unit in an intercoastal waterway (*Mitchell* v. *C. W. Vollmer & Co.,* 349 U.S. 427) and to similar workers engaged in the enlargement of an industrial plant producing goods for commerce. *Walling* v. *McCrady Construction Co.,* 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785. It reaches workers employed by an employer who repairs machinery for other employers who, in turn, produce goods for commerce. *Roland Co.* v. *Walling,* 326 U.S. 657. It covers off-the-road employees engaged in the production of material that is thereafter applied to interstate roads (*Alstate Construction Co.* v. *Durkin,* 345 U.S. 13); employees of a local contractor who engages in preliminary drilling which may eventuate in the production and shipment of oil (*Warren-Bradshaw Co.* v. *Hall,* 317 U.S. 88); and employees of a mutual irrigation company which collects and distributes water, wholly within a single state, to farmers who, in turn, raise agricultural produce which is ultimately shipped in commerce (*Farmers Irrigation Co.* v. *McComb,* 337 U.S. 755).

In sum, we submit that Congress, in enacting the Hobbs Act, proposed to exercise the full measure of the constitutional commerce power, and that delays in construction are within the reach of federal regulation where the facility being constructed is one

designed for the production of goods to be sold in interstate channels.

III. THERE WAS NO PREJUDICIAL VARIANCE BETWEEN THE CHARGE IN THE INDICTMENT AND THE PROOF [11]

The first paragraph of the indictment charged that a part of the interstate commerce consisted of transporting supplies for use in making concrete "used in the construction and erection of a factory or plant for processing steel" (R. 6). The second paragraph of the indictment described the "sand commerce" which Rider needed in order to perform his contract to supply concrete "for the erection of a steel processing plant at Allenport, Pennsylvania" (*ibid.*). The charging part of the indictment alleged (R. 7) that petitioner obstructed, delayed and affected "interstate commerce between the several states of the United States and the movement of the aforesaid materials and supplies in such commerce."

It thus appears that there is a general allegation as to effect upon interstate commerce; that there is additionally a specific description of effect upon "sand commerce"; and that there is reference to Rider's contract to supply concrete for the steel mill construction project.

We emphasize, to begin with, that the statute does not require that a particular aspect of interstate commerce be burdened by the proscribed conduct; it is enough that some aspect of interstate commerce is

[11] As pointed out above (pp. 20–22), there would be no occasion to reach this issue if the Government should be sustained in its contentions (1) that there was no commerce issue which had to be submitted to the jury and (2) that the evidence as to "sand commerce" was legally sufficient.

affected. It would not have been fatal if the indictment had alleged an effect upon commerce without "clarifying details" (*United States* v. *Varlack*, 225 F. 2d 665, 670 (C.A. 2) (Hobbs Act prosecution)), though doubtless such an indictment would have justified grant of a motion for a bill of particulars (*ibid.*). In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, this Court pointed out (p. 250) that "variation between the means charged and the means utilized is not fatal."

Since the statutory requirement of alleging the involvement of interstate commerce was met and the indictment is not defective as a matter of law, the question is whether petitioner was prejudiced. The relevant criteria are those set forth in *Berger* v. *United States*, 295 U.S. 78, 82:

> The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

The introduction of evidence relating to commerce in steel did not disable petitioner from presenting a defense on that aspect of the case. Petitioner objected to the testimony on grounds of relevancy (R. 50–52), but there is no suggestion that he questioned the accuracy of the testimony (testimony of an official of the Pittsburgh Steel Company that most of the produce of the company's Allenport plant is shipped

from Pennsylvania to other states) or that he desired to introduce any independent evidence on that subject. The testimony was given early in a trial which lasted for more than two weeks (R. 3). No request for time was made so that rebuttal evidence might be offered, although it is notable that defense counsel made requests of that nature in relation to other matters. See, *e.g.*, R. 266.

Moreover, there was no possibility that petitioner, if acquitted on the charge contained in the indictment, could have been subjected to a second prosecution. Petitioner's argument that there was a variance which could have resulted in double jeopardy must rest on the assumption that one act of extortion would constitute multiple crimes, depending on the number of ways in which interstate commerce was affected. In other words, in this case the assumption is that extortion affecting commerce in sand is one crime and the same extortion affecting commerce in steel is a separate crime separately punishable. The statute has never been so interpreted. The gist of the crime is extortion. The extortion must affect interstate commerce to be federally cognizable, but this does not change the nature of the offense. One extortion is one crime, no matter how many ways interstate commerce is directly or incidentally affected. This Court has held that one shot fired at two federal officers constitutes only one crime even though federal jurisdiction under the relevant statute rests upon the protection of government personnel. *Ladner* v. *United States*, 358 U.S. 169. Certainly, then, this Court would not sanction a multiplication of offenses in the

present situation. The danger suggested by petitioner does not exist.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

The Anti-Racketeering Act, 1934, 48 Stat. 979–980, read as follows:

> That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.
>
> SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or
>
> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or
>
> (d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

SEC. 3. (a) As used in this Act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

* * * * *

The 1946 Amendment, 60 Stat. 420, read:

That the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation", approved June 18, 1934 (48 Stat. 979; U.S.C., 1940 edition, title 18, secs. 420a—420e), be, and it is hereby, amended to read as follows:

"TITLE I

"SEC. 1. As used in this title—

"(a) The term 'commerce' means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term 'Territory' means any Territory or possession of the United States.

"(b) The term 'robbery' means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

"(c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the

movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

"SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both."

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SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1959.

Nicholas A. Stirone, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 11, 1960.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner Nicholas Stirone was indicted and convicted in a federal court for unlawfully interfering with interstate commerce in violation of the Hobbs Act.[1] The crucial question here is whether he was convicted of an offense not charged in the indictment.

So far as relevant to this question the indictment charged the following.

From 1951 until 1953, a man by the name of William G. Rider had a contract to supply ready-mixed concrete from his plant in Pennsylvania to be used for the erection of a steel processing plant at Allenport, Pennsylvania. For the purpose of performing this contract Rider

> "caused supplies and materials [sand] to move in interstate commerce between various points in the

[1] 62 Stat. 793, 18 U. S. C. § 1951.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

> United States and the site of his plant for the manufacture or mixing of ready mixed concrete; and more particularly, from outside the State of Pennsylvania into the State of Pennsylvania."

The indictment went on to charge that Stirone, using his influential union position,

> "did . . . unlawfully obstruct, delay and affect interstate commerce between the several states of the United States and the movement of the aforesaid materials and supplies in such commerce, by extortion . . . of $31,274.13 . . . induced by fear and by the wrongful use of threats of labor disputes and threats of the loss of, and the obstruction and prevention of, performance of his contract to supply ready mixed concrete."

The district judge, over petitioner's objection as to its materiality and relevancy, permitted the Government to offer evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other States but also interference with steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky. Again over petitioner's objections the trial judge charged the jury that so far as the interstate commerce aspect of the case was concerned, Stirone's guilt could be rested either on a finding that (1) sand used to make the concrete "had been shipped from another state into Pennsylvania" or (2) "Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce . . ." from Pennsylvania into other States. On motion of petitioner for arrested judgment, acquittal or new trial, the District Court held that "A sufficient foundation for introduction of both kinds of proof was laid in the indictment." 168 F. Supp. 490, 495. The Court of Appeals affirmed, all the judges agreeing that interference with the sand movements into Pennsyl-

vania was barred by the Hobbs Act. 262 F. 2d 571. Judge Hastie and Chief Judge Biggs disagreed with the court's holding that Stirone could be tried and convicted for interference with the possible future shipments of steel from Pennsylvania to Michigan and Kentucky. 262 F. 2d 578, 580. They were of opinion that no interference with interstate steel shipments was charged in the indictment and that in any event it is an unreasonable extension of the Act to make a federal offense out of extortion from a man merely because he is supplying concrete to build a mill which after construction will produce steel, a part of which may, if processed, move in interstate commerce.

We agree with the Court of Appeals that Rider's dependence on shipments of sand from outside Pennsylvania to carry on his ready-mixed concrete business entitled him to the Hobbs Act's protection against interruption or stoppage of his commerce in sand by extortion of the kind that the jury found the petitioner had committed here. That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference "in any way or degree." 18 U. S. C. § 1951 (a). Had Rider's business been hindered or destroyed, interstate movements of sand to him would have slackened or stopped. The trial jury was entitled to find that commerce was saved from such a blockage by Rider's compliance with Stirone's coercive and illegal demands. It was to free commerce from such destructive burdens that the Hobbs Act was passed. *United States* v. *Green*, 350 U. S. 415, 420.

Whether prospective steel shipments from the new steel mills would be enough, alone, to bring this transaction under the Act is a more difficult question. We need not decide this, however, since we agree with the dissenting

judges in the Court of Appeals that it was error to submit that question to the jury and that the error cannot be dismissed as merely an insignificant variance between allegation and proof and thus harmless error as in *Berger* v. *United States*, 295 U. S. 78. The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment.

Ever since *Ex parte Bain*, 121 U. S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In that case, the court ordered that some specific and relevant allegations the grand jury had charged be stricken from the indictment so that Bain might be convicted without proof of those particular allegations.[2] In holding that this could not be done, Mr. Justice Miller, speaking for the Court, said:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime and without which the

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[2] Bain was indicted for making a false statement "with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association . . . ." After sustaining demurrers of Bain to the indictment, the trial court went on to say that "thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words '*the Comptroller of the Currency and*' therein contained." By this amendment it was intended to permit conviction of Bain without proof that he had deceived the Comptroller as the grand jury had charged.

Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." 121 U. S. 1, 10.

The Court went on to hold in *Bain*:

"that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney . . . ." 121 U. S. 1, 13.

The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also *United States* v. *Norris*, 281 U. S. 619, 622. Cf. *Clyatt* v. *United States*, 197 U. S. 207, 219, 220. Yet the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare *Ford* v.

United States, 273 U. S. 593, 602; *Goto* v. *Lane*, 265 U. S. 393, 402. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare *Berger* v. *United States*, 295 U. S. 78. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.[3] Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is

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[3] "Yet the institution [the grand jury] was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex parte Bain*, 121 U. S. 1, 11. See also *Costello* v. *United States*, 350 U. S. 359, 362–363, n. 6.

affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the *Bain* case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. Cf. *Cole* v. *Arkansas*, 333 U. S. 196; *DeJonge* v. *Oregon*, 299 U. S. 353.

Reversed.